

July 25, 1995

P.S. Protest No. 95-18

DANIEL TIBBS

Solicitation No. 980-35-95

DIGEST

Protest against nonresponsibility determination is denied; contracting officer did not abuse his discretion in basing that determination on the protester's recent release from jail following long sentence for crime of moral turpitude.

DECISION

Mr. Daniel Tibbs timely protests the contracting officer's determination that he was a nonresponsible bidder on solicitation 980-35-95 for a highway transportation contract involving delivery of mail to various offices and the collection of mail from street corner collection boxes between the Tacoma, WA, Process and Distribution Center and Lakebay, WA.

Bids were opened on April 11. After the lowest bidder was allowed to withdraw his bid, Mr. Tibbs' bid was the lowest. However, the contracting officer found him nonresponsible because Mr. Tibbs had been released from prison in May, 1994, after having served eight years for the crime of sodomy involving a child. In a letter dated May 9, the contracting officer informed Mr. Tibbs that he could not find Mr. Tibbs to be a responsible bidder "because of the seriousness of your conviction involving moral turpitude." Mr. Tibbs protested the determination to the contracting officer, who forwarded the protest to this office.¹

Mr. Tibbs asserts that his conviction "has no bearing and does not reflect any irresponsibility to the subject of my honesty and credibility (as most any knowledgeable surety underwriter could explain). There are two categories of prisoners: one is those who made a mistake; and two are those who are career criminals, which I am not." The protest

¹ The award of the contract was postponed and an emergency contractor is providing service pending this decision.

asserts that despite the Procurement Manual [PM] provision regarding crimes involving moral turpitude [PM 12.5.2 a.2., *infra.*], "this appears to be an arbitrary decision." Mr. Tibbs claims that he is being unfairly discriminated against because "several postal employees with similar convictions [are] presently with the United States Postal Service . . . and at least one mail contractor with a dissimilar conviction (hard drugs -- cocaine) . . . was awarded a contract. . . ."

In a supplementary statement, Mr. Tibbs asserts that he was told by various employees of the Western Area Distribution Networks Office (DNO), which issued the solicitation, that an ex-felon could hold a postal contract as long as the conviction had not been for dishonesty, theft or fraud, and had not been within the past five years.

In his statement in response to the protest, the contracting officer asserts that there are different requirements for determining eligibility for contractors, who are not postal employees, than for those seeking direct employment with the Postal Service.² He cites PM 12.5.2 a.2., which states that persons "with known criminal records that involve convictions for offenses involving moral turpitude or dishonesty" are ineligible to perform contract services.³ The contracting officer states that he "cannot comment on other contractors with dissimilar convictions nor does it have any relevance on the decision not to award this contract" to the protester. The contracting officer states that the "seriousness of Mr. Tibbs' offense is significant as it reflects on his character and ability to effectively interact with the community in which he would serve as [a] . . . contractor."⁴ The contracting officer states that the DNO "did not . . . discriminate against Mr. Tibbs" in following the PM. The contracting officer points out that Mr. Tibbs had been out of prison for less than one year at the time of the nonresponsibility determination, and states:

This office would be deficient in its duty to award a contract to a person with a conviction of this nature without clinical or psychiatric documentation stating he has been rehabilitated and that there is little or no likelihood that he would repeat this type of offense in the future. Mr. Tibbs was encouraged to

² Notwithstanding the contracting officer's assertion, the standards for hiring persons as direct employees of the Postal Service are not significantly different from those applicable to the selection of contractors. Section 313.3 of the Personnel Operations Handbook EL-311, Hiring Policy on Applicants with Criminal Records, gives hiring authorities considerable discretion in evaluating the employability of applicants with criminal records on an individual basis. EL311 313.32 states:

It is the obligation of hiring authorities to assess job applicants' criminal records fairly. The intent of this is to enable appointing officials to fulfill this obligation in a manner consistent with the primary duties of the Postal Service to maintain the security of the mail and to assure public trust in the integrity and reliability of postal employees.

EL-311 313.343 states that factors such as the nature and underlying circumstances of the offense, the length of time elapsed since the offense, and evidence of efforts made toward rehabilitation should be considered on a case by case basis.

³ Mr. Tibbs intended to perform the service on the route himself.

⁴ The contracting officer apparently refers to the fact that the contract would allow Mr. Tibbs to have access to outgoing mail collected from neighborhood mailboxes.

provide documentation of his rehabilitation from parole officials, doctors, etc.
No substantiated documentation was provided.^[5]

In response to the contracting officer's statement, the protester asserts that the "seriousness of my offense is no longer a factor now as conditions have changed, as well as my behavior. . . ." He characterizes his offense as "a failure on my part to handle the situation properly" and states that he has "no intention of committing this or any other type of offense again." He suggests that "it would be detrimental to the U.S. Postal Service to award any contract to any person with more than one conviction of this nature" because "one conviction suggests that he made a mistake but multiple offenses indicate a proclivity toward such behavior."

A protest teleconference was conducted with the protester and his attorney, both of whom stressed that Mr. Tibbs "has paid" for his crime. The protester's counsel argued that the PM language regarding "moral turpitude" is outdated and no longer used in criminal law, and the only criminal offenses which should be relevant in awarding this type of contract are those involving dishonesty, such as theft or fraud. In followup written comments, the attorney complains that the "moral turpitude" standard is "overly broad and general when compared to the standards used in [the] Federal Rules of Evidence" and asserts that the contracting officer should "focus primarily on honesty and truthfulness as a contracting reliability standard."

Mr. Tibbs also submitted a statement following the conference. In it he stresses that his "ethic" requires him "to admit the truth" and that honesty is "the only policy."

DISCUSSION

"To be determined responsible, a prospective contractor must:

. . .

4. Have a sound record of integrity and business ethics;

. . .

⁵ In the course of the protest, the protester submitted a letter from a clinical psychologist which stated, in part, that "Mr. Tibbs can not legitimately lay claim to being a 'rehabilitated' sex offender" because of "cognitive distortions which support [his] offending." However, the doctor states that were Mr. Tibbs to enter a treatment program for sex offenders at this time, "I would find Mr. Tibbs presently safe to be at large in the community and safe to assume employment positions where there is minimal risk of encountering children. . . ."

Subsequently, the protester submitted a second letter from the psychologist which asserts that "the Postal Service would be well-served by awarding a contract to Mr. Tibbs. His willingness to enter counseling speaks of high character and excellent responsibility orientation." The psychologist states his belief that Mr. Tibbs is a "highly responsible individual who is well-qualified to assume employment as a mail courier/contractor on a Highway Route" The doctor reiterates that he recommends that Mr. Tibbs "participate in specialized sex offender treatment, a program he will likely complete within one to three years."

and

8. Be otherwise qualified and eligible to receive award under applicable laws and regulations."

PM 3.3.1 b. PM 3.3.1 e.1. provides that in the absence of information clearly showing that a prospective contractor meets standards of responsibility, the contracting officer must make a determination of nonresponsibility. See *Illinois Lock Company*, P.S. Protest No. 89-35, September 26, 1989; *Innovative Sales Brokers, Inc.*, P.S. Protest No. 89-41, August 31, 1989.

The standard for our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement[s of the contract] with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

North American Manufacturing Corporation, P.S. Protest Nos. 29; 30, September 16, 1994; *OSM Corporation*, P.S. Protest Nos. 91-59; 91-61; 91-67, December 29, 1991; see also *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993; *Wetler Corporation*, P.S. Protest No. 89-12, April 26, 1989.

The contracting officer based his determination of nonresponsibility on his reasonable assessment of the seriousness of the crime for which Mr. Tibbs served eight years in prison and the lack of documentation evidencing his current responsibility. It was well within the contracting officer's discretion to conclude that Mr. Tibb's offense involved "moral turpitude," and as such he was ineligible to perform service on the route for which he bid.⁶ We could not overturn such a determination even if another contracting officer might have found differently on the same or similar facts. Cf. *Rita Dwight*, P.S. Protest No. 92-15, July 14, 1992 (determination of nonresponsibility was a "close call"; however, there was "adequate evidence in the record to support it as not being arbitrary or capricious").⁷

⁶ Counsel's argument against the PM language, based on analogies to state and federal rules of evidence in criminal trials, is unavailing. The PM, which has the force and effect of law, 39 C.F.R. 601.100, allows the contracting officer to reject prospective contractors because of criminal records involving moral turpitude. Challenges to PM provisions are beyond the protest jurisdiction of this office. *W.M. Schlosser Company, Inc.*, P.S. Protest No. 93-30, March 9, 1994; *EnPro Corporation*, P.S. Protest No. 91-48, October 9, 1991.

⁷ Since the solicitation provided that "[o]al explanations or instructions given before the award of a contract will not be binding," the protester cannot rely on the advice allegedly received from DNO employees. See *Owens Roofing, Inc.*, P.S. Protest No. 91-75, December 3, 1991.

While Mr. Tibbs has stated that he is rehabilitated, the evidence which he submitted does not support that statement. At best, it suggests that, given time and treatment, he could meet responsibility standards at some unspecified time in the future. In this case, however, the protester has failed to meet his burden of showing that the contracting officer's determination was not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.; Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49; 53, October 14, 1992.⁸

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

⁸ Compare *Leslie A. Harrison*, P.S. Protest No. 89-49, September 21, 1989, which was sustained because the protester's four-year-old crime of carrying a concealed weapon was considered too remote in time to justify a nonresponsibility determination. The decision also discussed the nature of the offense and that the protester had served no prison time and was eligible to have his criminal record expunged under state law. The protester here, unlike the protester in *Harrison*, lacked evidence of sustained satisfactory behavior in society, having been released from prison less than a year prior to the responsibility determination.